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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-192

BUFFALO CAB COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-24a) is reported at 458 F. 2d 499. The Board's decision and order (Pet. App. 1a-22a) are reported at 189 NLRB No. 66.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1972, and a timely petition for rehearing was denied on June 21, 1972 (Pet. App. 24a-25a).

The petition for a writ of certiorari was filed on August 3, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the company's taxicab owner-drivers are employees rather than independent contractors.

STATUTE INVOLVED

In addition to the provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), set forth at Pet. 3-4, Section 8(a)(1) is also relevant. It provides:

> It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

STATEMENT

A. The Board's Findings of Fact

Petitioner, Buffalo Cab Company, Inc. (the "Company"), and its affiliated corporation, Buffalo Holding Co., Inc. (the "Holding Company"), provide taxicab transportation in Atlanta, Georgia (Pet. App. 4a; A. 95, 101).[1] The cabs are operated by "owner-

[1] "A." refers to the Appendix to the briefs in the court below.

drivers," who are hired as follows: The Company agrees to "sell" a cab to a prospective "owner-driver" (Pet. App. 5a; A. 116-117). Oral financing arrangements are made, with the owner-driver making a downpayment[2] tailored to his circumstances and determined, in part, by whether the Company believes him to be "a good cab driver" (A. 164-166). The driver also agrees to make weekly car and dues payments, which are unilaterally set by the Company, for the use and maintenance of the cab and the right to operate within the Buffalo Cab system (Pet. App. 5a, 6a-7a; A. 117-118, 165-166, 144, 201).

The car payments are spread over as much as a three-year period with no financing charges, and the payments are suspended when the cab is in the shop for repairs or the owner-driver is ill (Pet. App. 5a; A. 63, 191, 206, 219, 270). Moreover, if an owner-driver fails to make weekly car and dues payments, his car becomes subject to repossession and "resale" by the Company without regard to any equity he may have in it (A. 270, 20, 45, 180-181).[3] The Holding Company, which originally purchased the cabs, retains title to them, takes depreciation deduc-

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[2] If a driver cannot afford a "downpayment," the Company may still hire him to operate a cab, in which case he will be treated exactly like the owner-drivers who are "buying" their cabs (A. 172-173).

[3] Very few drivers have been able to complete the payments. Of the approximately 95 vehicles operating in the Buffalo Cab system at the time of the Board hearing, only nine were owned outright by single owner-drivers and five were so owned by persons with more than one cab (Pet. App. 5a; A. 119-120).

tions for them on its income tax returns, and registers them (Pet. App. 5a, 6a; A. 114, 143-144, 257).

The Company requires the owner-driver to fill out an application for the permit that is required to operate a taxicab in Atlanta (Pet. App. 7a; A. 131-132, 243, 244). An Atlanta ordinance provides that "no permit shall be granted to any person or corporation for the operation of taxicabs within the City of Atlanta unless such person or corporation has a minimum of ten taxicabs operating under its supervision and control at the time of consideration of its application" (Pet. App. 7a; A. 265). By its sponsorship of the owner-driver, the Company also certifies "that the applicant is to work with this company as a driver and so far as tort liability is concerned, we will occupy legal relation of principal and agent and will assume responsibility for his actions as an agent provided by law of Georgia as relates to principal and agent" (Pet. App. 7a-8a; A. 243).

The Company requires all taxicabs operating within the Buffalo Cab system to be identical in appearance. They are all painted white, and the name "Buffalo Bill Cody" is painted on their sides. The Company's telephone number must be prominently displayed on the sides and roof of each cab. The top light on each cab bears the words "Buffalo Bill Cab," along with a replica of a buffalo head (Pet. App. 6a; A. 122-123, 240).

All Buffalo Cabs are equipped with two-way radios, which are owned by the Holding Company and leased to the Company. The Company's dispatch system

provides a large portion of the business available to the owner-drivers (Pet. App. 7a; A. 178). When someone calls the Company requesting a taxi, the Company dispatcher notifies the owner-drivers on duty and, under the Company's rule, the answering driver nearest the caller's location has the option to pick up the caller (Pet. App. 6a, 7a; A. 128-129). All drivers are supposed to be on duty six days a week, every week, in order to meet payments to the Company (Pet. App. 7a; A. 63).

The Company also bargains for and maintains exclusive cab stands for Buffalo Cabs at profitable locations in Atlanta (Pet. App. 7a; A. 196-197, 207). Drivers working these stands are required by Company rule to let the first cab at the stand take the first fare (Pet. App. 7a; A. 197). Further, the Company maintains charge accounts for some of its customers, and the owner-drivers are furnished clerical aids for use in facilitating credit transactions with these customers (Pet. App. 6a; A. 125-127, 129, 241). Charge accounts are also maintained for airlines flying into Atlanta (Pet. App. 6a; A. 129). All charge accounts are processed through the Company's centralized bookkeeping system (Pet. App. 6a; A. 126).

The Company provides owner-drivers with business cards with which to solicit business (Pet. App. 6a; A. 123-124, 241). These cards bear the Company's name and telephone number, together with the Company slogan and a drawing of a buffalo head. The Company's name and telephone number also appear

in the Atlanta telephone directory; the Company receives and handles calls for taxi service, as well as customer complaints, at this number (Pet. App. 6a; A. 123, 128).

In conjunction with the owners of Atlanta's other licensed cab companies and without the participation of the owner-drivers, the Company has obtained cab fare rate increases from the city (Pet. App. 7a; A. 198-200). The Company also submits sales taxes on the taxi fares to the state and receives a rebate on the taxes for timely submission (Pet. App. 6a; A. 138-140). The Company provides federal income tax collection and bookkeeping facilities for the owner-drivers to pay "self-employment taxes," and it annually draws a check for the payment of taxes for owner-drivers making use of these facilities (Pet. App. 6a; A. 140, 183).

Under the Atlanta ordinance requiring licensed city cab companies to assume liability for the negligence of their owner-drivers, the Company posts a bond with the city (Pet. App. 6a, 7a-8a; A. 266, 157, 133). The Company is a self-insurer for up to $15,000 of liability; beyond that, it purchases insurance that covers liability up to $100,000 (Pet. App. 6a, 7a-8a; A. 132-133). When an accident involving a Buffalo Cab occurs, the Company sends an investigator to the scene of the accident, who fills out the Company's accident report form and attempts to settle any claims (Pet. App. 6a, 7a-8a; A. 134-136). If he cannot settle a claim, the officers of the Company make an attempt at settlement (Pet. App. 6a,

7a-8a; A. 136). If suit is brought, the Company provides attorneys for the court action (Pet. App. 6a, 7a-8a; A. 136-137). Any claim which the Company ultimately satisfies is without contribution by the owner-driver involved in the accident; the Company also absorbs the loss of the taxicab if it is demolished, and owner-drivers are not required to obtain collision insurance to protect the Company's "security interest" in the cab (Pet. App. 6a, 7a-8a; A. 136, 202-203).

In operating the cabs, the owner-drivers obtain gas, oil, and minor repair work from Buckley's Garage and Service, a company located on premises owned by the Holding Company and shared with the Company (Pet. App. 5a, 7a; A. 146-147, 235, 238). When a Buffalo Cab is in need of major repairs, the Company will provide an owner-driver with an interest-free loan to cover the cost of repair (Pet. App. 7a; A. 194-195). When repairs are needed on the taximeter, the two-way radio, or the top light, the Company itself provides these repairs without charge to the owner-drivers (Pet. App. 7a; A. 137, 145-146, 181).

B. The Decisions Below

Based on the foregoing facts, the Board found that the Company's owner-drivers were "employees" within the meaning of Section 2(3) of the Act,[4]

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[4] Section 2(3) provides that the term "employee" shall not include "any individual having the status of an independent contractor."

rather than independent contractors, and that therefore they were entitled to collective bargaining rights under Section 7 of the Act (Pet. App. 7a-8a). The Board further found that the Company had violated Section 8(a)(1) of the Act by threatening and coercively interrogating owner-driver Charlie Jones and by discharging him for engaging in protected concerted activity (Pet. App. 18a-19a). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 23a-24a).

ARGUMENT

In *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 256, the Court held that "general agency principles" are to be used in distinguishing between employees and independent contractors under the Act. The Court acknowledged that "[t]here are innumerable situations where it is difficult to say whether a particular individual is an employee or an independent contractor" and that in such cases "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." (390 U.S. at 258).[5]

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[5] The cases cited by petitioner, involving different facts and types of employment, are therefore inapposite. As the court of appeals held in *National Labor Relations Board* v. *A.S. Abell Company*, 327 F. 2d 1 (C.A. 4), cited by petitioner (Pet. 16), "precedent is of limited value in the resolution of this question" (327 F. 2d at 10).

The Court also held that the Board's determination of this issue should "not be set aside just because a court would, as an original matter, decide the case the other way" (390 U.S. 260):

> As we said in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, "Nor does it [the requirement for canvassing the whole record] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." 340 U.S., at 488. Here the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's order. It was error to refuse to do so.

The court of appeals here properly declined to disturb the Board's finding that an employer-employee relationship existed between petitioner and its drivers. The evidence established that the drivers "do business in the company's name with considerable assistance and guidance from the company and its managerial personnel"—one of the "decisive" factors in *United Insurance Co.*, *supra*, 390 U.S. at 259. Moreover, the Company treats its drivers as "employees" in obtaining permits for them to operate the cabs, assumes tort responsibility for the drivers as employees, and its sister corporation (Buffalo Holding Co.) retains title to the cabs, takes depreciation deductions for them on its income tax returns and registers them.

On these and the other facts enumerated above, the Board properly concluded that petitioner's drivers were employees, rather than independent contractors, within the meaning of the Act. Under the standard of judicial review announced in *United Insurance* the court of appeals correctly upheld that finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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